



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

Virginia Law Register

VOL. XI.]

DECEMBER, 1905.

[No. 8.]

Copyright, 1905, by J. P. BELL COMPANY.

THE DEATH PENALTY—REASONS FOR ITS ABOLITION.

By WILLIAM E. ROSS, Richmond, Va.

We are loath to admit the faults of a custom which for time out of mind has been such, because it is difficult to realize that what has existed so long can be wrong in principle. Man clings with wonderful tenacity to the past. Ancient customs he regards with something like religious reverence. What has been the practice of most countries, of most ages, comes to be looked upon as an essential element of the social system. This being the case, if we would get a just hearing in favor of the abolition of a penalty which has stood for unnumbered years and the substitution of something in lieu thereof, we should first have the mind disabused of this idea, which it instinctively takes, that whatever is is right.

The question of the death penalty as a punishment is one to which our people have given little or no attention. Especially is this true in the South. This lack of consideration, I believe, in a large measure accounts for its retention.

That some kind of punishment is necessary to the protection of society is, of course, obvious. That kind of punishment which affords the best protection should be given preference, provided other interests and rights are subserved as well. It is also much to be desired as another cardinal principle that punishment should look to the reformation of the criminal. Whatever means of punishment the state may adopt, it should keep in full view the several interests that must be subserved. For example, a penalty that is seldom or rarely enforced serves rather as a barrier to the protection intended. Again, a penalty that fails as a deterrent serves no other purpose than to confuse. And if the penalty serves well as a preventive, but jeopardizes other interests, a more perfect method should be sought.

It is the purpose of this article to show that the death penalty is not necessary for the protection of society; that trial has proven it not to be the great preventive agent it was once considered; that instead of minimizing crime, as all punishment should do, it actually increases and inspires it, as it serves as an incentive to the morbid vanity of criminals; that it is a degrading relic of barbarism, and unworthy of any highly developed system of government.

It is not contended in this article that it would be wise to do away with the extreme penalty in every case at once. All reforms are of slow growth. The peculiar conditions of the South might make it necessary to retain it for the crime of crimes. But this is caused by abnormal conditions. On this point I wish to adopt the language of Mr. Whitehead Klutz:* "In what is here written it is not claimed that the death punishment can expediently be abolished everywhere, at once, and for all crimes. The argument here made is general and of general application. To take an account of local conditions would unduly extend it. It is felt that in the American cotton states the problem is complicated by the presence of a semi-servile race.

"The principle is the thing—and the principle is right. Yet it must bide its time. Education and evolution rather than revolution are the means of its sure accomplishment. Law is the formally declared sense of the community. It works from within out. Without the sanction of the community consciousness there may be statutes—there cannot be law.

"So if you say to me we are 'not ready to abolish capital punishment,' I reply, 'Then so much the worse for the South. Let us grow! At least, friend, might we not modify a penal code that denounces four capital crimes when the will of the community denounces death upon but one, and then usually outside of the court house.'"

A bloody code has never made crime less frequent. In the reign of Edward III there were in England a hundred and sixty offences punishable by death, and thousands dragged to the gibbet every year. Instead of acting as a deterrent, crime thrived so that no man's life or property was safe. There were in proportion to the population at this time eighteen cases of homicide to every one that occurs in our day. Henry VIII hanged seventy thousand

*1 N. C. Law J., p. 57.

thieves; and yet robbery upon the highways flourished, and the suburbs of the principal cities were infested by mercenary assassins. The same exacting ruler hanged three hundred beggars in a year; and this did not so much as to help keep vagrancy down. These were days, mind you, when the pickpocket was hanged; so was the sheep stealer and the forger of one pound notes. And in the face of all this, unparalleled crime flourished.

If the death penalty does not serve as a preventive for the lesser crimes, obviously it will not act as a deterrent for the more atrocious. The remarkable decrease in crime that followed close upon Sir Robert Peel's reform in striking from England's criminal code more than a hundred capital offences clearly indicates that the extreme penalty not only fails as a deterrent, but oversteps the purpose which should actuate all punishments. It has been demonstrated by English history that just as fast as you take the death penalty from a crime, the crime diminishes. A severe criminal code has never failed to be a contemporary of unusual crime.

There is a well-known maxim of the law laying down the principle that "*The end of punishment is to prevent crimes, and that this end is more surely attained by the speediness of its infliction and its certainty than by its severity.*" Prof. John B. Minor adopts this principle in his admirable work "*Synopsis of the Law of Crimes and Punishments.*" But curiously enough he follows this idea on the next page with the expression that "*the death penalty is necessary, etc.; first, because no other penalty is sufficiently dreaded so as to deter men from wicked passions; secondly, because none other is irrevocable, or will be so deemed by offenders.*"*

As to "*speediness of infliction,*" it is well known with what caution a court must needs proceed in a case of sufficient magnitude as to come under the head of the death penalty. The mere fact that the punishment is '*irrevocable*' makes it inconsistent both in "*speediness and certainty.*" It is well known how loath juries are to convict in capital cases. Naturally, they look on all sides for some loophole to justify acquittal. And as the verdict in most cases must be either death or acquittal, the "*certainty*" of any punishment whatever, however proper, is seriously compromised. Most criminals in capital cases are acquitted. Of two hundred and seventy-one persons indicted in the United States courts for

*Min. Syn. pp. 2, 3.

murder in 1890, 1891 and 1892, only sixty-three were convicted of any offense, and of this number only an unlucky thirteen met the extreme penalty, more than three-fourths going without punishment, and not quite five per cent. suffering the death penalty.*

The proportion of convictions as a whole, so far as death penalty is concerned, is even less. There are on an average more than eight thousand homicides a year in the United States, and executions rarely amount to but little more than a hundred. Quoting from Secretary Taft's address to the graduating class of the Yale Law School:

"Since 1885, in the United States there have been 131,951 murders and homicides, and there have been 2,286 executions. In 1885 the number of murders was 1,808. In 1904 it had increased to 8,482. The number of executions in 1885 was 108. In 1904 the number was 116."

The remedies suggested by Judge Taft for this increase in crime are as follows:

"The cure for this growing cancer in the body politic may be found in statutory amendments. If laws could be passed, either abolishing the right of criminal appeal and leaving to the pardoning power, as in England, the correction of judicial wrong; or, instead of that, if appeals must be allowed, then if a provision of law could be enacted by which no judgment of the court below should be reversed except for an error which the court, after reading the entire evidence, can affirmatively say would have led to a different verdict, 99 reversals out of 100 under the present system would be avoided. Second, if the power of the court by statute to advise the jury, to comment and express its opinion to the jury upon the facts in every criminal case, could be restored, and if the state and the defendant were both deprived of peremptory challenges in the selection of a jury, twenty-five per cent of those trials which are now miscarriages of justice would result in the conviction of the guilty defendant, and that which has become a mere game in which the defendant's counsel play with loaded dice, would resume its office of a serious judicial investigation."

The answer of "Law Notes" to this statement is so cogent that it is in part here repeated:

*9 Green Bag, p. 129.

"Our criminal laws are as efficient as any laws can be to cure the disease of crime. Practically nine out of every ten crimes committed are punished in some manner, the average length of time from arrest to sentence being less than thirty days. Appeals from convictions are taken by defendants in about nine cases in a thousand, and in but two and a half of these nine cases is there a reversal by the appellate courts upon any ground whatever. These are facts, not theories, based upon actual statistics. The reforms urged by Judge Taft do not seem, therefore, to be vitally necessary. The actual remedy for the increase of crime seems to be the taking of some steps distinct and apart from the punishment for crime after it has been committed. Rather must we prevent its ever being committed. The cause of and the opportunity for crime should be the objects of attack. To accomplish this, it may be that we should better educate our paupers, or isolate the criminal classes, or adopt some similar measures to stop the birth of criminals and the spread of criminal instincts. But no conceivable change in criminal procedure can operate to prevent the breach of penal laws. Punishment never has had and never will have an appreciably deterrent effect upon the commission of crime.

"When the people of our various commonwealths shall become convinced, as they ultimately will, of the truth of the statement that punishment does not prevent the commission of crime, the days of capital punishment in this country will be numbered. Remove from consideration its deterrent effect, and you have refuted the last argument in favor of the death penalty. The state, theoretically, does not seek revenge. It punishes with two ends in view, viz., that the murderer shall not have the opportunity to murder again, and that other men shall be deterred by the contemplation of the penalty attached to the crime from the commission of like acts. It will surely dawn upon our benighted minds some day that either one of these two ends can be amply attained by imprisoning as by the taking away of the criminal's life. It is rather a sad commentary upon our national intelligence and humanity that we have not recognized this fact long ere this, and that the old Mosaic law of 'an eye for an eye and a tooth for a tooth' should still form a part of our system of jurisprudence. Russia, at whom we are wont to point as an example of semi-civilization,

abolished the death penalty for murder more than a century and a half ago. The theory that fear of death as a punishment is an all-powerful force operating upon the minds of men to restrain them from committing murder, was long since exploded by expert criminologists. Enrico Ferri, in his work on Criminal Sociology, says: 'And in the statistics of capital punishment at Ferrara during nine centuries, I discovered the significant fact that there is a succession of notaries executed for forgery, frequently at very short intervals, in the same town. This attests the truth of the observation made by Montesquieu and Beccaria, as against the deterrent power of the death penalty, for men grow accustomed to the sight; and this again is confirmed by the fact mentioned by Mr. Roberts, a gaol chaplain, and M. Berenger, a magistrate, that several condemned men had previously been present at executions, and by another fact mentioned by Despine and Angelucci, that in the same town, and often in the same place, in which executions had been carried out, murders are often committed on the same day.'"

But few juries will convict where the extreme penalty is the only alternative. If excitement runs high as in the McCue and Cluverius cases, conviction is usually certain. Not a single white man has been executed in Richmond since Cluverius in 1886, and but three negroes, although homicides have been committed at the rate of several a year, and by whites as well as blacks. In our recent primary election in this city one of the candidates for Commonwealth's Attorney advertised himself as having defended five capital cases, and without a single execution.

A few years ago the Governor of Wisconsin said that but for the abolition of capital punishment in that state, one-half of those convicted and punished would undoubtedly have escaped *all* punishment.* The difficulty of enforcing the death penalty turns most of the murderers loose to prey upon society as they may, whilst if life imprisonment was substituted instead, they would don the felon's garb instead of walking in freedom, thus bearing out the idea "that a moderate law rigidly enforced may carry more terror to the heart of the criminal than a rigid law moderately enforced. It is the absolute certainty of punishment of

*1 N. C. L. J. 62.

some sort, rather than a mere possibility of extreme punishment that takes the spirit of bravado out of the criminal.”*

If “the end of punishment is the prevention of crime” why insist upon a method that is “irrevocable,” especially when fallible man must sit in judgment? It is the duty of the state to protect society as best it may, and in dealing with the criminal such means of punishment should be used as would minimize crime, and, if possible, make a more social being out of the transgressor. Robespierre advocated a sound doctrine when he said: “Punishments are not made to torture the guilty, but to prevent crime from the fear of incurring them. The legislator who prefers death and atrocious punishments to the mildest means within his power outrages public delicacy, and deadens the moral sentiment of the people he governs in a way similar to that in which an awkward teacher brutalizes the mind by the frequency of cruel chastisements. In the end he wears and weakens the springs of government in trying to bend them with greater force.”

It is not the intention of the law in administering punishment merely to torture. Such an idea is repugnant to any highly developed system of jurisprudence. We should adopt the *lex rationalis*, not the *lex talionis*. The state therefore should have no other aim in view than the protection of its citizens and the reformation of the criminal. When it does this, it has accomplished all that can come with the province of the government. Quoting from Mr. Jacob Sphan:† “Where society and its rights are concerned there is but one thing clear and indubitable with reference to crime; namely, that society has the inalienable right to preserve itself safely and wholesomely intact as an organized aggregation of individuals,—it has the inalienable right to journey its way any whither fairly and in peace. Society and its constituent human units are entitled to security in all things which each may justly do, in all the enterprises which each may justly undertake. Anything that disturbs the serenity of this security or fairly threatens to disturb it, may be abated or forestalled; but such abatement must only go so far as to surround society with conditions that will neutralize the activity of the disturbing forces.” That this doctrine is sound cannot be disputed. The protection of society

*9 Green Bag 229.

† 2 Green Bag 108.

against the criminal is more secure where life imprisonment is the highest punishment than in jurisdictions where statutes abound with death penalties. When the prisoner passes through the prison gates of the penitentiary, society need have little fear, save of an abuse of the pardoning power, and as convictions are more than a hundred per cent. more certain in the absence of the death penalty, the protection to society is rendered proportionately better. It would seem that in the proportion that the punishment attains certainty, it is effectual, and in the proportion that it fails in attaining certainty, it fails as a deterrent.

Quoting from Westminster Review:* "In Lord Hobart's pamphlet it is stated that the chances which the murderer has of escaping the penalty due to his crime are four times greater than those of the thief. While such, or anything like it, is the state of the law, no one can be astonished that the details of murder should so frequently fill the columns of newspapers. What we urge then, is not that society should sacrifice a portion of its security to a maudlin philanthropy, but that society should cease to be so careless of its own interests; that by substituting the more certain punishment for the less certain, it should afford a better guarantee for the protection of life."

The very fact that capital punishment is "irrevocable" is one of the strongest arguments in favor of its abolition. Curious it is that the advocates of the retention of the death penalty should argue irrevocableness in its favor. They forget that when the state, in a mock compliance with its solemn admonition not to kill, drags the offender mercilessly to the hand of an executioner, and in its cold, passionless premeditation commits the same crime it pretends to right, an act is done which is eternally irreparable, and if a mistake is made there is no reparation. However cautious a court may be, the innocent must sometimes suffer, because man with all the acquirements possible is wonderfully fallible. And why should the only punishment that is irrevocable be given when the state can strike the criminal in so many places and in so many ways. Many innocent people have suffered judicial murder. Instances have been known where the accused confessed his guilt, hoping for mercy, was sentenced to die for murder, even the *corpus*

*91 Westm. 201.

delicti being apparently established beyond a doubt, and afterwards the supposed murdered man turned up well and strong. Instances are more frequent where innocence has been otherwise established after the supposed criminal has suffered his irreparable wrong. Many confessed their guilt of witchcraft in New England. Nineteen were executed. Confession is often inspired by the hope of executive clemency. Power to take life under the sanction of the law? Power to commit a second murder because some one was criminal enough to commit the first? Righting a wrong by another wrong? Administering the eternally irreparable by a fallible judge? Life is given by the only Infallible One, who in his infinite wisdom and mercy endowed it with a spark of the Deity, and the taking of it of right belongs only to Him who gave it, and was never intended to be "pinched out like the flicker of a mean tallow dip." If a punishment is revocable, and a mistake is made, that mistake can, in some sense, at least, be righted; because the innocent convict may be recalled from the prison walls to the bosom of his loved ones, regain his own esteem, and love may lighten his latter days. But when the law drags to the gibbet an innocent or irresponsible being, and the executioner reaches out and springs his death trap, the victim from his hell of utter darkness can no more cry out to the world protesting his innocence.

There are many ways by which judicial murder may be committed. The criminal, of course, is an abnormal unit of society. We can know little of the mental condition of the offender. The influences of heredity or insanity may make him wholly irresponsible—a disease for which there can be no well-defined criterion. The lunatic is also an abnormal unit of society, and is confined for safety's sake during his derangement, and if his case is incurable, his incarceration is for life. Crime is often committed by those whose lives have been most orderly. Sometimes it is by persons who are the least anti-social, being the result, it is believed, of a derangement of the finer qualities of human nature.

In the case of the lunatic, the State acts sensibly and humanely in quarantining the subject, and if possible, effecting a cure. In the case of the criminal no effort whatever is made towards making him fit for society. Quoting again from Mr. Jacob Sphan:* "The

*2 Green Bag 108.

State entrusts the administration of this treatment and the application of these regulations to persons of no skill whatever in the premises, indeed, to individuals remarkable as a rule for very inferior intelligence and unusually hardened sensibilities. It often becomes a question which of the two, the keeper or the kept, is really most in need of treatment. In truth, the entire business is quack-cry, pure and simple; the quack insisting, as usual, that his medicine is a panacea and his treatment infallible." Deadening the sensibilities of the criminal by cruel chastisement will never make him a better subject for society.

But even in the case of the most positive evidence there may be a mistake in the identity of the prisoner. Wills, in his work on Circumstantial Evidence, cites case after case where mistakes as to identity were made. Nor should we be unmindful of the fact that a man's life may be sworn away by perjury and the world be none the wiser. Any one familiar with our courts will tell you that perjury is committed every day even over the most trivial money matters. Cowper was right when he said:

"Thousands careless of the damning sin
Kiss the Book's outside and ne'er look within."

A remarkable fact in regard to convictions in capital cases is that they are seldom had on the strength of direct evidence, but almost in every instance upon the sole strength of circumstantial evidence. Things have come to such a pass in this particular that if you would convict, no one must see the crime committed. Imagine a case: A murder is committed. Someone had a motive (and motives are always readily found in every case of homicide). A train of circumstances will naturally point to some one more than to others. The supposed motive may be the fact that the accused would receive the property of the dead man, or that he was his enemy. This being the case, about all else that is necessary is to find something belonging to the accused, perhaps with his name on it, somewhere in the neighborhood of the corpse, which, together with the fact that it might be somewhat difficult for him to explain his whereabouts, completes the chain. Circumstances like these fitted together by unscrupulous detectives, working for hire, may make innocence most difficult to explain. On this point Baron Alderson well says:

"The mind is apt to take pleasure in adapting circumstances to one another, and even in straining them a little if need be, to *force* them to form parts of one consecutive whole . . . and in considering such matters to overreach and mislead itself, to suppose some little link that is wanting, to take for granted some fact consistent with previous theories, and necessary to render them complete."*

Again, granting that it would be just, so far as the prisoner himself is concerned, to convict of capital punishment in certain cases, it works a most cruel hardship upon his family, leaving them "with shame for a heritage," and in want. In this way a whole family of criminals, under the force of circumstances, may grow up. Punishment falls more heavily upon the innocent than the guilty. If a man is guilty of a crime, deprive him of his liberty, but not of his life.

The right to life is natural and inalienable. The constitutions both of the United States and State so declare. If the right to life is natural, it cannot by any compact be given up. Man has not the right to divest himself of this inalienable right. This being true, has the State the right to say that life is a natural and inalienable right and then under certain conditions require it of her citizens, even though the individual himself cannot rightfully dispose of it?

But it is contended by the advocates of the retention of the death penalty upon our statutes that it has been ordained for all generations that homicide shall be punishable by death, to substantiate which they usually quote from Gen. IX: 6: "Whoso sheddeth man's blood, by man shall his blood be shed." This inexorable law is found only under the Mosaic dispensation, and was repealed by the benign teaching of the Nazarene on the shores of Galilee. If we adhere to the teachings of Him who taught on the Mount, no longer can we demand:

"And if any mischief follow, then thou shalt give life for life;

Eye for eye, tooth for tooth, hand for hand, foot for foot;

Burning for burning; wound for wound, stripe for stripe.'

Laws are not made for the purpose of retaliation. That law which demands revenge can never have a wholesome effect upon society. All that is finest in civilization is bound up with self-restraint and humanity.

Under the Mosaic law the nearest relative of the murdered man pursued the offender and sought revenge. Quoting from Numbers XXXV: 19: "The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him." For the protection of a man who inadvertently killed another, cities of refuge were builded. Of these cities there were six. And if a man was pursued by the infuriated next of kin, he could go to this city of refuge and remain until the death of the high priest or until "the congregation shall judge between the slayer and the revenger of blood." Are we consistent when we want a portion of the Mosaic law enforced, but do not dare enforce it as it was? None of us desires to revert to the system of allowing the avenger of blood to perform the execution if perchance he could do so before the city of refuge is reached, and even then in case the "congregation" shall decide against the seeker of refuge, turn him over to his enemies that "the revenger of blood himself shall slay the murderer?" Moses killed an Egyptian, and David's hands were not clear of the blood of Uriah. But in these instances as well as many others, the law of "Whoso sheddeth man's blood," etc., did not obtain. The spirit of Christianity is not retributive justice. Christ asked the adulterous woman, "Where are those, thine accusers? hath no man condemned thee? She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee, go and sin no more." Sticklers for the death penalty would adhere strictly to the law of Moses in one particular, when society would not dare enforce the law as it was at that time. In other words, they endorse that which they like; they reject that which they disapprove. Bat-like, they play both the bird and the mouse with the Scriptures.

But there is a law written by the hand of God, for all people and for all time, and which we must obey. "Thou shalt not kill" belongs to God's highest admonitions. The commandments are universal and applicable to all alike. Nor are they excused by conditions and provisos.

The taking of human life cannot have a wholesome influence upon society—it does not deter the criminal. On the other hand, the interest elicited in a trial for life or death serves as an incentive to excite the morbid vanity of criminals—the criminal on trial for life or death is a hero among them, the king of his

kind, as it were. If the State hurries some poor wretch to death, can it then with consistency exclaim, "Oh life, thou priceless thing!" while its victim dangles from the scaffold, making the life of him who was created in the image of his Maker appear a *worthless thing*. Can this inspire the better element of man? On the contrary, do not the onlooker and those who eagerly read of the disgusting affair, even little children whose minds are inflamed by the glaring headlines of yellow journalism, absorbing as it were, the blood-curdling drama, become contaminated with its exciting details, and drunk with the blood of a fellow creature? You may say that this will not affect the strong; but the strong must first be weak and gather strength from proper sources. If the fountain is poisoned, the stream cannot be pure. It is a well established fact among those who have taken interest in criminology that an atrocious crime is usually followed by others. It was not a mere coincidence of the story related of the French woman who witnessed the guillotining one day and was seized by a mania to slay her own child the next, and in a lucid interval requested that it be kept from her. Quoting again from an article of Mr. Whitehead Kluttz: "The remarkable fact that Rev. Dr. Roberts of Bristol, England, visited 167 murderers in prison and found that 164 of them had witnessed executions is more than a mere coincidence."*

To show the demoralizing influence that an execution has upon the community at large, I quote from an editorial of the *Times-Dispatch*, Sept. 27, 1903:

"MURDERER, BUT HERO.

That is a strange story which comes to us from Wise, Va., concerning the execution of Branham, the man of many murders. Just before he was taken to the gallows he was permitted to stand in front of the jail and address a crowd of fifteen hundred people. He gave an account of his wicked life, he told of the many murders he had committed, and from the report printed in the *Times-Dispatch* yesterday it would appear that he was very proud of his career. He made a sort of hero of himself; he told how he had shot and killed his poor blind wife, and called upon the crowd to know whether or not he had done right. Five hundred hands were raised in response as a token of approval. Finally, he declared that he had made his peace with God and that he was going home to heaven.

*1 N. C. L. J. 64.

"This disgusting spectacle was clearly contrary to the spirit of section 4063 of the Code, which provides that 'in no case shall the sentence of death be executed in a public manner.' It is not stated by our correspondent that the execution was public, and we take it for granted that the sheriff complied with the law so far as the execution itself was concerned. But it was clearly contrary to the spirit of the law, as we have said, to permit this confessed murderer to make a speech to a great concourse of people outside the jail enclosure and exploit his many crimes and lionize himself. The object of an execution is to deter other men from committing crime, but it is apparent from the report from Wise that this purpose was entirely defeated in the case of Branham. In the estimation of many of those present he died the death of a hero, and it will not be surprising if some of those who heard his speech, and who manifested sympathy with him and approval of one of his murders, should try to imitate his example."

The abolition of capital punishment has been followed by satisfactory results in Michigan, Maine, Rhode Island and Wisconsin. In Michigan, where statistics have been taken, there has been a decided decrease in criminality, and the same is believed to be true of the others. In a recent letter to the writer, the Chief Justice of the Supreme Court of Michigan says:

"It has been a good many years since that form of punishment was abolished. Occasionally after some particularly atrocious murder, a newspaper advises its re-enactment. Sometimes a member of the Legislature introduces a bill restoring capital punishment. However, public sentiment is *so decidedly against that form of penalty that there is no probability of such a law ever again being enacted in this State.*"

In a letter dated July 28, 1905, Judge William W. Douglas, Chief Justice of the Supreme Court of Rhode Island, says:

"My impression is that violent crimes have not increased out of proportion to the increase of population. Certainly the abolition of the death penalty has not appreciably tended to lessen the security of the community. Pardons of murderers have been rather common, but only after they have served considerable terms of imprisonment and usually when they have become old or incapable of doing further harm.

"Our statute still imposes the penalty of death upon a person who commits murder while under a sentence of imprisonment for life. No case of this kind has occurred where the prisoner has escaped alive, and consequently this penalty has *never been enforced*."

Some of the sticklers for capital punishment argue that a person imprisoned for life would have nothing to deter him from murdering his keepers in the absence of death penalty, as his punishment could not be made heavier. If trouble of this kind is apprehended, the example of Rhode Island is open to us. But no case of this kind has occurred in that state.

The abuse of pardons is also brought forth as one of the great arguments against the abolition of the death penalty. But restrictions could be placed upon this. Certainly we could make four walls secure enough and enact statutes strong enough to prevent either escape or abuse of the pardoning power if necessary. And, too, why should we deplore the few days of freedom given an old and trusted prisoner who is incapable of doing further harm? Certainly it is humane to let him depart this life in freedom and in peace. Victor Hugo says "the principles never assert grandeur and beauty so well save when they defend those whom even pity does not defend."

The abolition of the death penalty has also been followed by satisfactory results in Switzerland, Belgium, Holland, and Finland. In each of these countries a decrease in criminality has followed its abolition.

Few are aware of the fact that in America we have one of the bloodiest codes in the world. Not only that, but the statutes in most states provide in effect (this is true in Virginia) that a jury shall be chosen in capital cases who favor the law providing the death penalty. They are required to state what their opinions are concerning capital punishment. This is the only case known where a juror must give his opinion of the law under which the prisoner is being tried. In one of our states perjury comes under the death penalty. In another setting fire to a hay rick is visited with the highest punishment, while in quite a number burglary and thieving are deemed worthy of the death penalty. In this respect we have held to obsolete English laws while England herself has repealed them.

We should impress upon the people the sacredness of human life. Let us regard the taking of it the sole prerogative of Him who gave it. It is endowed with a spark of the Deity. No man is altogether bad, just as nobody is altogether good. Human nature is not black to start with; the black spots are made by association and environment. God in his infinite wisdom and mercy never made man altogether bad or incapable of reform. Using the language of the eloquent Frenchman already referred to: "To rob the man of the possibility of expiating his crime by his repentance or by acts of virtue; to close to him without mercy every return towards a proper life and his own esteem; to hasten his descent, as it were, into the grave still covered with the blotch of his crime, is in my eyes the most horrible refinement of cruelty."

There is but slight probability that the criminal will make his peace with God under sentence of death. The excitement of his trial, the hope of pardon or escape, the approach of the terrible execution, and the consciousness of the shame he has brought upon his family, aggravated, it may be, by the wife and little children he is to leave in want and disgrace, gives him but little opportunity for the awful ordeal. He may go to the scaffold a perjured man cherishing the vain hope of pardon even at the last moment.

The scaffold, our relic from barbarism, has cursed the world for thousands of years. The historian has failed to tell us of the time when it did not exist. It is a menace to civilization. We have not risen above the most primitive methods in this respect. The time is approaching when it must go. This enlightened age will not always allow it to block the path of humanity. The public conscience is revolting against the horrible atrocities of the past.

My remarks may to some appear extremely radical. But we only have to think a moment to realize that we are approaching the abolition of the death penalty. We have gone already more than half the way. The century just closed witnessed a most remarkable reformation in punishments. It saw slavery, branding, torture and mutilation stricken from the statutes of the world. Half the countries of Europe have abandoned the death penalty, and England has reduced her more than one hundred capital offences to four; and the good work is making progress in our own Union, as evidenced by the decided stand of

four of our states, while in others it is being narrowed down by one offence at a time. The world is growing more humane. There is no reason why we should not learn to punish crime without imitating it.

With all confidence, the writer ventures the expression that the end of the present century will not find the death penalty (except perhaps for treason or rape) upon the statute books of a single civilized country of the world. Deep-rooted prejudices and the morbid cry for revenge cannot stem the tide. Our methods will not always be old methods. We will rise above whatever taint of barbaric influences that now remains with us. The law-makers will learn to consider the *preservation from guilt* of the great majority who are as yet guiltless as of an importance infinitely higher. There is one undeviating rule taught by history with respect to punishments—let them not afford an example of cruelty to others.